



Chapter Twenty-One

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EMPLOYMENT LITIGATION CAUSES OF ACTION



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EMPLOYMENT LITIGATION CAUSES OF ACTION

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I. INTRODUCTION

This Chapter briefly explains many of the theories under which employers and employees sue each other. The specific requirements of many of these causes of action vary based on state law; thus, employers should check the laws of the states in which they do business.

II. POTENTIAL CLAIMS ARISING BETWEEN EMPLOYER AND EMPLOYEE

A. “Wrongful Discharge.” In a wrongful discharge suit, an employee claims she or he was terminated for some wrongful purpose. Most employees are employed “at will,” which means, generally they can be discharged for a good reason, bad reason, or no reason as long as it is not for an illegal reason. Illegal reasons include sex, race, religion, or other protected category, as defined by federal, state, or local law and may include retaliation and violations of public policy.

In many jurisdictions, an employment arrangement is considered to be “at will” unless the parties clearly intended otherwise. The employment at-will defense to a wrongful discharge action has been defeated in some jurisdictions when employees did not receive adequate notice that they were employed at will. For example, in *Durtsche v. Am. Colloid Co.*, 958 F.2d 1007 (10th Cir. 1992), a disclaimer belatedly added to an employee handbook was insufficient to allow a company to terminate employees at the will of the company because the company was not forthcoming about the fundamental nature of the change to the handbook.

Some states have enacted statutes limiting the employment at-will doctrine. For instance, Montana law prohibits any discharge without “good cause” and any discharge not in conformance with the employer’s own written employment policies. Mont. Code Ann. 39-2-904.

B. Fraudulent Misrepresentation. Promises to hire or retain an employee may become the subject of a fraud suit if the promises were made with no intention of performance and the employee relied upon the promises.

To prevail in a suit for fraud, an employee must prove five essential elements:

- The employer misrepresented or concealed a material fact;
- The employer knew the fact was false when the statement was made;
- The employer intended to induce the employee’s reliance;
- The employee took action in reliance on the accuracy of the representation; and
- The employee sustained damages.

See, e.g., *Golden v. Mobil Oil Corp.*, 882 F.2d 490 (11th Cir. 1989); *Hord v. Env’tl. Research Inst.*, 617 N.W.2d 543 (Mich. 2000) (reversing jury verdict in favor of employee and finding employee’s misinterpretation of financial report was insufficient to hold employer liable for fraudulent inducement where there was no false statement by the employer); *Hutson, Inc. v. Windsor*, 2015 WL 4133670, at *5 (W.D. Ky. July 8, 2015) (rejecting fraudulent inducement claim because “Kentucky law requires that ‘a misrepresentation, to be actionable [sic], must concern an existing or a past fact, and not a future promise, prophecy, or opinion of a future event, unless declarant falsely represents his opinion of a future happening’”). In *Hutson*, the plaintiff’s claim failed because the defendant’s promises were “predictions of future events and do not represent past or present material facts.” *But see Morrison v. AccuWeather, Inc.*, 2015 WL 4357346, at *6 (M.D. Pa. July 14, 2015) (denying motion to



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dismiss fraudulent inducement claim where CFO, who was discharged 13 days after he was hired, claimed he was told employer had long-term business goals and the position required long-term commitment).

1. Fraudulent Inducement. In some states, an employer may be liable for inducing an employee to leave one job for another, if the employer misrepresents the essential aspects about the new job, and the misrepresentation induces the employee to leave his or her current job. See, e.g., *Helmer v. Bingham Toyota Isuzu*, 29 Cal. Rptr. 3d 136 (Ct. App. 2005) (affirming jury verdict in favor of plaintiff who was fraudulently induced to leave his job for a new job based on misrepresentations the new employer made regarding the new job's rate of pay). In *Helmer*, the jury awarded the plaintiff more than \$400,000 in future income lost from his old job and punitive and emotional distress damages.

Other courts have recognized claims for fraudulent inducement, where the claim is factually separate from a wrongful discharge claim. See *Stewart v. Jackson & Nash*, 976 F.2d 86, 89 (2d Cir. 1992) (permitting fraud in the inducement claim by a lawyer who was induced to change jobs by the defendant's representations regarding its client base because these were allegedly statements of present facts).

2. Negligent Misrepresentation. Some courts have recognized a claim for negligent misrepresentation in certain situations. For example, in *Griesi v. Atlantic General Hospital*, 756 A.2d 548 (Md. 2000), the court held that an at-will employee stated a claim for negligent misrepresentation under Maryland law, based on intense negotiations between the plaintiff and the defendant's CEO, where the CEO was in a position that would lead the plaintiff to rely on his apparent authority to make an offer. See also *Singer v. Beach Trading Co.*, 876 A.2d 885 (N.J. Super. Ct. App. Div. 2005) (employer can be held liable for the negligent misrepresentation of a former employee's work history if: (a) the inquiring party clearly identifies the nature of the inquiry; (b) the employer voluntarily decides to respond to the inquiry, and thereafter unreasonably provides false or inaccurate information; (c) the person providing the inaccurate information is acting within the scope of his/her employment; (d) the recipient of the incorrect information relies on its accuracy to support an adverse employment action against the plaintiff; and (e) plaintiff suffers quantifiable damages proximately caused by the negligent misrepresentation). But see *Hobler v. Hussain*, 975 N.Y.S.2d 212 (N.Y. App. Div. 2013) (affirming summary judgment for employer on plaintiff's negligent misrepresentation claims alleging he was induced to leave his prior employment and that hospital employees made misrepresentations including: his position with the hospital would be secure; its orthopedic department was stable; and the hospital had no plans to affiliate with any other medical facility). In *Hobler*, the Appeals Court held that the plaintiff could not reasonably have relied on any assurances his employment would be secure in light of his employment contract's express provision permitting his termination without cause.

C. Promissory Estoppel. Under the doctrine of promissory estoppel, a promise, which the promisor should reasonably expect to induce action or forbearance on the part of the person to whom the promise is made and which does induce that action or forbearance, is binding if injustice can be avoided only by the enforcement of such promise. The elements of promissory estoppel are: (1) a clear promise; (2) reliance; (3) substantial detriment; and (4) damages measured by the extent of the obligation assumed and not performed. See, e.g., *Blinn v. Beatrice Cmty. Hosp. & Health Ctr., Inc.*, 708 N.W.2d 235 (Neb. 2006) (noting that in Nebraska, promissory estoppel does not require the promise giving rise to the cause of action meet the requirements of an offer that would ripen into a contract if accepted by the promisee; instead of requiring definiteness, promissory estoppel requires only that reliance is reasonable and foreseeable); *Morrison v. Nana Worleyparsons, LLC*, 314 P.3d 508 (Alaska 2013) (rejecting promissory estoppel claim based on the employer's alleged breach of the employee's performance improvement plan (PIP)). In *Morrison*, the court noted the PIP did not contain any express promise of continued employment, the employer merely offered the employee one more chance instead of firing him immediately. For a discussion of potential breach



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of contract claims, please see the *Employment Contracts and Noncompete Agreements* Chapter of the SourceBook.

D. Defamation (Libel/Slander). In its most basic sense, defamation occurs whenever a speaker or writer communicates a false statement to a third person and that statement injures the reputation of the person identified in the statement. The defamation is called libel if it is written or otherwise tangible and slander if it is spoken. Although the two may differ slightly in some technical respects, for the purposes of these materials, both are treated as one issue.

1. Elements of Defamation. The essential elements of defamation are as follows:

- a. a false and defamatory statement, i.e., a statement that injures the reputation or community standing of another person or discourages others from associating with that person;
- b. concerning the plaintiff;
- c. that is “published” or communicated to a third party;
- d. with fault amounting to at least negligence (some states have not required a showing of fault or negligence if the plaintiff is a private person and the defendant is not a member of the media); and
- e. with proof of damages or a presumption of damages to the plaintiff as a matter of law.

See, e.g., *Eitler v. St. Joseph Reg’l Med. Ctr. South Bend Campus, Inc.*, 789 N.E.2d 497 (Ind. App. 2003) (affirming summary judgment in employer’s favor on the plaintiff’s defamation and blacklisting claims; authorization for references plaintiff signed barred claims against former employer based on negative employment reference). In *Transport Care Services, Corp. v. Shaw*, 2013 WL 5433991 (Tex. App. 2013), the court held a suggestion by the plaintiff’s former employer to his new employer that the new employer should perform a background check on the plaintiff because “There’s a lot that y’all don’t know, a whole lot. But because of HIPAA, everything is constrained” was not actionable. According to the court, the statement implied that if the new employer performed a background check on the plaintiff, it would discover facts the former employer was “constrained” to reveal. Thus, the facts underlying the former employer’s opinion that he “felt sorry” for the new employer were available for the new employer to consider and did not involve an “implication of undisclosed facts.” Accordingly, the court reversed the jury verdict award on the plaintiff’s defamation claim. Additionally, because these statements were not defamatory, the court reversed the lower court’s judgment in the plaintiff’s favor on his claims of intentional interference with past and future employment. To establish liability for these claims, the plaintiff was required to show that he was harmed by conduct that was tortious or unlawful. The only conduct the plaintiff relied on to support his claims were the comments made by his former employer to his new employer, which the court held were not defamatory. Thus, they could not support his interference claims.

2. Defamation Claims Arising From Discharge.

- a. **Publication.** Because publication is an element of defamation, employers should not publish the reasons for discharge of an employee. *But see Beck v. Tribert*, 711 A.2d 951, 960 (N.J. Super. Ct. App. Div. 1998) (no publication when the plaintiff had friends call the former employer posing as prospective employers to elicit defamatory statements).
- b. **Conduct as Publication.** While a claim for defamation may be supported by actions, merely escorting an employee off the premises after termination generally does not constitute defamatory publication. See *Bolton v. Dep’t of Human Servs.*, 540 N.W.2d 523 (Minn. 1995); *Gay v. William Hill Manor, Inc.*, 536 A.2d 690 (Md. Ct. Spec. App. 1988).
- c. **Internal Communications.** That an employer placed adverse information in a former employee’s personnel file, without more, may be insufficient to support a defamation claim. *Johnson v. Martin*, 943 F.2d 15 (7th Cir. 1991). Circulation of an employee evaluation report



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among various levels of management may be the type of “publication” sufficient to trigger a suit for defamation. See *Bals v. Verduzco*, 600 N.E.2d 1353 (Ind. 1992). The *Bals* court noted there is a conflict among the state courts as to whether the circulation of documents within the company can satisfy the requirement that the defamatory matter be “published.” According to the court, several states, including Alabama, Georgia, Louisiana, Minnesota, Missouri, Nevada, Oklahoma, Pennsylvania, Washington, and Wisconsin view the corporation as merely communicating with itself for defamation law purposes. *Id.* at 1354, fn.1. See also, e.g., *Gladue v. Saint Francis Med. Ctr.*, 2014 WL 5313747, at *2 (E.D. Mo. Oct. 16, 2014) (“intra-corporate communications made in the regular course of business do not constitute publications, because the communications are made within the corporation itself and not to a third party”) (citations omitted); *Olson v. Uehara*, 2014 WL 4384065 at *8 (W.D. Wash. Sept. 4, 2014) (“Washington courts have consistently held that intra-corporate communications are not considered published for purposes of a defamation claim when the statements are made within the ‘limits of their employment.’”); *Whitt v. Baldwin Cnty. Mental Health Ctr.*, 2013 WL 6511856 at *18 (S.D. Ala. Dec. 12, 2013) (“If the speaker was engaged in corporate business and the communication to the hearer ‘falls within the proper scope of that employee’s knowledge or duties,’ there is no publication for purposes of a defamation claim.”). The court in *Bals* also noted that California, Florida, Illinois, Kansas, Kentucky, Massachusetts, Michigan, New York, and Pennsylvania take the opposite view and consider damages to one’s reputation within a corporate community to be just as devastating as that caused by defamation spread to the outside. *Id.* at 1355, n. 2. The court in *Bals* rejected the notion that internal communications are not sufficiently published to permit a suit but held the evidence in that case did not show the supervisor abused a qualified privilege. See also *Popko v. Cont’l Cas. Co.*, 291 Ill. Dec. 174 (App. Ct. 2005) (holding that under Illinois law, the publication requirement is satisfied, even within the corporate environment, when there is publication to a third party).

d. Defamation by Self-Publication. Defamation by self-publication, sometimes called “compelled self-publication” is an exception to the general rule that a third person must publish a statement. This form of defamation, when recognized, occurs when discharged employees reveal their reason for termination on subsequent job applications. The discharged employees allege they are being compelled, in effect, to “publish” the prior employer’s defamatory statements. Courts that allow the claim find it to be a logical extension of defamation law because forcing people to slander themselves is as damaging as slandering them directly.

The supreme courts of Iowa, *Theisen v. Covenant Med. Ctr.*, 636 N.W.2d 74, 83-84 (Iowa 2001), Minnesota, *Lewis v. Equitable Life Assur. Soc’y*, 389 N.W.2d 876, 886-887 (Minn.1986)¹; Missouri, *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. 2000), and North Carolina, *Hedgepeth v. Coleman*, 111 S.E. 517 (N.C. 1922), and courts in California, Tennessee, Texas, and parts of New York have allowed such claims. However, many state courts of last resort have rejected defamation by self-publication claims. See *Cweklinsky v. Mobil Chem. Co.*, 837 A.2d 759 (Conn. 2004); *White v. Blue Cross & Blue Shield of Mass.*, 809 N.E.2d 1034 (Mass. 2004); *Gonsalves v. Nissan Motor Corp.*, 58 P.3d 1196 (Haw. 2002); *Sullivan v. Baptist Mem. Hosp.*, 995 S.W.2d 569, 571-74 (Tenn. 1999); *Gore v. Health-Tex, Inc.*, 567 So. 2d 1307, 1308-09 (Ala. 1990); *Lunz v. Neuman*, 290 P.2d 697 (Wash. 1955). See also *Emery v. Ne. Ill. Reg’l Commuter R.R.*, 377 Ill. App. 3d 1013 (2007) (Ill. App. Ct. 1st Dist. 2007) (noting the Second and Fifth Districts of the Illinois Appellate Court and the Seventh Circuit Court of Appeals have rejected the tort of compelled self-defamation and that these decisions “are in alignment with the majority of jurisdictions addressing this issue.”). Colorado and Oregon have rejected the doctrine by statute. See Colo. Rev. Stat. Ann. § 13-25-125.5; Or. Rev. Stat. § 30.178(2).

¹ In Minnesota, the doctrine recognized in *Lewis v. Equitable Life Assur. Soc’y*, 389 N.W.2d 876, 886-887 (Minn.1986) is limited by statutes that disallow compelled self-defamation claims in certain circumstances. See Minn. Stat. Ann. § 181.962(2) (barring self-defamation claims based on employee’s review of own personnel file); Minn. Stat. Ann. § 181.933(2) (barring self-defamation claims based on employee’s request of reason for discharge in writing).



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3. Defamation Claims Arising From Investigations of Theft. Employers should be concerned about defamation in employer investigations and actions related to employee theft for an obvious reason: any statement that is communicated about an employee accused or suspected of theft raises the possibility of injury to employee's reputation and the risk of a lawsuit. A claim may arise from statements made in the course of the investigation, in interviews, in discussions among security officers, employees and supervisors, in the process of responding to requests for references, during judicial or administrative hearings, in response to questions from the news media or co-workers, or in any other context in which negative information about the employee is communicated.

In light of the potential for defamation claims, including defamation by self-publication where recognized, and the U.S. Supreme Court's holding in *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133 (2000) that a plaintiff is not required to always produce evidence of discrimination in addition to evidence that the employer's reason for the adverse employment decision was false to get to a jury, employers should explain the reasons for an employee's discharge carefully. For example, if an employer discharges an employee for a reason that is potentially defamatory, (such as theft), it may be wise to phrase the reason for the discharge in terms of a violation of policy (for example, violation of the employer's cash control policies).

4. Protection From Defamation Liability: The Privilege Defense. While the truth of a statement is always a defense to claims of defamation, some types of statements and information are privileged as a matter of law. In certain situations, employers who communicate privileged information cannot be held liable for defamation even though the employer communicated information that is false and defamatory, if the requirements of the privilege are satisfied. Privileges may be absolute or qualified. A statement that is absolutely privileged cannot be the basis for defamation regardless of the truth or falsity of the statement, the injury caused, or the motives of the person who made the statement. Absolute privileges are relatively rare. A qualified privilege covers statements made in good faith, without bad motives, made only to those with a legitimate business interest in the information. A plaintiff may overcome a qualified privilege by showing an abuse of the privilege.

a. Absolute Privilege. Statements made in the course of giving testimony in criminal cases, in judicial proceedings, and in pleadings filed in a judicial proceeding are absolutely privileged in most, if not all, states. See, e.g., *Watkins v. Laser/Print-Atlanta*, 358 S.E.2d 477 (Ga. Ct. App. 1987); *Della-Donna v. Gore Newspapers Co.*, 489 So. 2d 72 (Fla. 4th DCA 1986). If the statements were not relevant to the judicial proceeding at hand or were made in the context of pre-litigation settlement discussions, the privilege is qualified, not absolute, under some states' laws. See, e.g., *Sussman v. Damian*, 355 So. 2d 809, 811 (Fla. 3d DCA 1977).

In most states, statements made in quasi-judicial proceedings are also absolutely privileged. See, e.g., Fla. Stat. § 443.041 (privilege for statements made during unemployment compensation proceedings); *Palmer v. Women's Christian Ass'n*, 485 N.W.2d 93 (Iowa Ct. App. 1992) (in adjudication of claims for defamation and interference with contract, holding that an employer's letter to state job service listing the reasons for an employee's termination was properly excluded by the trial court from evidence because Iowa statute provides for absolute privilege unless report or statement is made with malice). Employers should review the laws of the states in which they have employees to determine whether information in a particular proceeding is privileged.

b. Qualified Privilege. In many states, employers have a qualified privilege from liability for false statements made to persons with a legitimate common interest in the information. The following are the essential elements in finding a qualified privilege: (1) good faith; (2) an interest to be upheld; (3) a statement limited in its scope to the interest to be upheld; (4) a proper occasion; and (5) publication in a proper manner. See, e.g., *Richmond v. Southwire Co.*, 980 F.2d 518 (8th Cir. 1992) (an employer's statement to local newspapers that employees



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had been fired for violating company policies following an investigation into drug use was not defamatory); *Bentlejewski v. Werner Enterprises, Inc.*, 2015 WL 4111476, at *3 (W.D. Pa. July 8, 2015) (holding that employment verifications provided by former employer to potential employers identifying four minor incidents involving the plaintiff during his employment were conditionally privileged, and noting that under Pennsylvania law, “a conditional privilege applies when a prior employer provides an evaluation of a former employee at the request of a prospective employer”).

Most states apply a qualified privilege to communications made as part of internal investigations, provided publication is not made to persons who do not have a legitimate interest in the information. See, e.g., *Stewart v. Pantry, Inc.*, 715 F. Supp. 1361 (W.D. Ky. 1988) (communications to plaintiff’s supervisors through the chain of command are protected by the qualified privilege); *Rojas v. Debevoise & Plimpton*, 634 N.Y.S.2d 358 (Sup. Ct. 1995) (partner’s remark to associate that plaintiff had stolen documents was subject to qualified privilege because associate was an employee of the law firm and shared an interest in protecting documents from theft). Generally, a qualified privilege attaches to a report made in discharge of a public or private duty by statute or request. See, e.g., *Delta Health Group, Inc. v. Stafford*, 887 So. 2d 887, 897 (Ala. 2004).

c. Statutory Privilege. A number of states have enacted statutes that shield an employer from liability for disclosing information regarding former employees to a prospective employer if the statutory requirements are met.

d. Jury Issues. The availability of the privilege does not always doom the plaintiff’s case or give the employer absolute protection. The privilege may be overcome by evidence of some question concerning the good faith or motives of the speaker/writer, or suggesting abuse of the privilege. Furthermore, the privilege may be overcome when the speaker: (1) knows or reasonably should know the statement is false; (2) the statement serves a purpose contrary to the interests of the privilege; or (3) the statement is excessively published. See *Williams v. Bell Tel. Labs.*, 623 A.2d 234 (N.J. 1993).

In many cases, courts have held that the privilege applied to a particular communication and left it to the jury to decide whether the privilege had been abused by excessive publication or the employer’s lack of good faith or malice.

e. Precautionary Measures. Employers should follow several rules designed to preserve the privilege:

- (1) Statements about employees should be limited in scope to the purpose of the common business interest at stake. Avoid excessive publication or needless repetition of the statements because this may dilute and ultimately destroy the privilege. Limit or avoid publication to co-workers who do not have an interest in the matter.
- (2) Employers should take appropriate steps to ascertain the facts before making statements. This will promote accuracy and lessen the risk of making damaging inconsistent statements. Fellow employees or supervisors who may have had a personal problem with the employees being investigated should be cautioned and perhaps should be excluded from responding to any inquiries from third parties regarding the employee.
- (3) Employers and their representatives should avoid any tendency to be colorful in the descriptions of the employee and should remain factual at all times. Limit statements, particularly employment references, to information that can be verified and documented. Limit statements to those that are relevant to the job involved and responsive to the questions asked by the prospective employer and to another person’s need to know.
- (4) Whenever possible, former employers and prospective employers should obtain a signed, full consent or release from the employee for the purposes of references and investigations.



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E. Invasion of Privacy. Most states recognize some form of the common law invasion of privacy tort. One notable exception to this is the state of New York. Courts in that state have declined to recognize a common law right to privacy. See *Hurwitz v. United States*, 884 F.2d 684 (2d Cir. 1989) (“no so-called common law right of privacy exists in New York”). New York’s Civil Rights Law protects an employee’s right to privacy if the employer uses the employee’s name, portrait, or picture for advertising purposes without obtaining the employee’s consent. See N.Y. Civ. Rights Law § 50.

The four common types of invasion of privacy include: (1) the commercial appropriation of the name or likeness of another; (2) publicity that places a person in a false light; (3) unreasonable intrusion upon the solitude or seclusion of another; and (4) the unreasonable publication of private facts. The last two types are most relevant to the employment field and the problems typically raised by employer investigations.

1. Types of Invasion of Privacy Claims.

a. Unreasonable Intrusion. Unreasonable intrusion may include surveillance, unauthorized physical presence, breaking and entering, unauthorized photography, intrusion into private activities, and similar matters, which are detailed below. Unreasonable intrusion can extend to some forms of investigations or examinations of a person’s private life and can lead to liability if the intrusion would be highly offensive to the reasonable person. This claim often accompanies a federal claim for sexual harassment. See, e.g., *Potts v. BE & K Constr. Co.*, 604 So. 2d 398, 400 (Ala. 1992), limited by *Machen v. Childersburg Bancorporation, Inc.*, 761 So. 2d 981 (Ala. 1999).

Generally, publication or communication of the information obtained, if any, is not a necessary element of the claim. The claim is based upon the psychological distress caused by the intrusion, regardless of publication or whether any information was obtained. However, individual state laws must be checked.

(1) Surveillance. Workplace surveillance may subject an employer to liability for invasion of privacy, depending on the facts of the situation and whether the employee was notified of and consented to the surveillance. See, e.g., *Smith v. NWM-Okla., L.L.C.*, 2008 WL 2705047 (W.D. Okla. July 8, 2008) (denying summary judgment on plaintiff’s invasion of privacy claims based on the employer’s use of a baby monitor to listen to her consultations with potential clients). For more information regarding the legal issues implicated by workplace surveillance, see the *Potential Liability in the Electronic Workplace* Chapter of the SourceBook.

(2) Drug Tests. In *Luedtke v. Nabors Alaska Drilling*, 768 P.2d 1123 (Alaska 1989), the court held an employee could not maintain an action for invasion of privacy based on an assertion that, while he voluntarily gave urine samples, he had no notice that the urine would be tested for drugs. *But see Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11 (N.J. 1992) (unreasonable drug testing could constitute violation of employee right to privacy).

(3) Medication Information. State law may create a right to privacy with regard to certain medical conditions or medical information in general. See, e.g., *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 877-78 (8th Cir. 2000) (reversing jury award of \$5,000 in compensatory damages and \$50,000 in punitive damages to a woman who claimed the employer’s disclosure of her staph infection was an invasion of privacy; disclosure of medical information was not highly offensive as required by Arkansas law and plaintiff had no expectation of privacy because she informed two co-workers that she had a staph infection).

(4) Polygraph Tests. Employees who are forced to submit to polygraph tests have a statutory right to sue the employer in the District of Columbia. D.C. Code Ann. § 32-903 (2014). Employers should check the applicable state laws. See the *Discipline and Discharge* Chapter of the SourceBook for a detailed discussion of polygraph tests.



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b. Public Disclosure of Private Facts. This type of invasion of privacy generally involves employees suing employers for publicly disclosing true but embarrassing private facts about the employee. If that publicity would be highly offensive to a reasonable person, and if it is not a matter of legitimate public concern, the employer may be liable.

Unlike a defamation claim, an employer may be liable under this theory even if the statement is true. In fact, unwarranted publication of the truth is the essence of this tort. Mere publication to any third party is not sufficient under this theory even though it generally is sufficient for defamation claims. Disclosure to a small group of persons who have an obvious interest in the subject matter of the disclosure is not sufficiently public to state a cause of action for invasion of privacy. The focus of this claim is disclosure of private facts, whether true or not, to a large number of people. See *Lewis v. Snap-On Tools Corp.*, 708 F. Supp. 1260 (M.D. Fla. 1989).

Defense: Consent. As with the intrusion tort, consent is a defense. Because a person may waive his or her right to privacy, the use of releases and consent forms should be considered before the information is gathered and when a prospective employer or other party subsequently requests it.

c. False Light. This type of privacy tort involves liability for giving publicity to a matter concerning another that places the other before the public in a false light. To be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person and the defendant must have acted with knowledge or reckless disregard as to the falsity of the publicized statement. An example would be falsely attributing a statement or opinion to the plaintiff, filing suit in the plaintiff's name without authorization, or falsely accusing the plaintiff of a crime. As with Public Disclosure of Private Facts, the heart of this tort lies in the publicity rather than the invasion into the plaintiff's physical seclusion or private affairs, and many jurisdictions limit the tort to information that would normally be considered "private." A statement may be actionable under a false light theory without rising to the level of defamation, however, because there is less emphasis on public reputation under false light theory than under defamation. However, at least one state supreme court has refused to recognize this cause of action. See *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1108 (Fla. 2008) (nonemployment case holding that Florida does not recognize a claim for false light invasion of privacy but does recognize a cause of action for defamation by implication). In *Jews for Jesus* the court held, "[b]ecause defamation by implication applies in circumstances where literally true statements are conveyed in such a way as to create a false impression, we conclude that there is no meaningful distinction on that basis to justify recognition of false light as a separate tort."

In addition, at least one court has held a corporate employer liable for compensatory damages for false light based upon the actions of its employee, even though the corporation bore no fault of its own. *Douglass v. Hustler Mag.*, 769 F.2d 1128 (7th Cir. 1985).

Defense: Consent. As with the other privacy torts, consent can be an affirmative defense to a claim of false light. Consent should be to the use actually made of the subject matter by the defendant, because some courts do not extend a general consent agreement to include use of such information for any purpose not specifically contemplated by the consent.

d. Appropriation of Name or Likeness. This type of privacy tort involves the appropriation of the name or likeness of another for one's own use or benefit. The interest protected by the tort is the exclusive interest in one's own identity as it is represented by his or her name or likeness. The most common cause of action for this tort involves use of the plaintiff's name or likeness in advertising, although some states impose liability for noncommercial uses as well. Incidental mention of the plaintiff's name, or publication of his or her name or likeness for purposes other than taking advantage of his or her prestige or other value associated with his or her name or image, does not give rise to liability.

2. Employer Searches. The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against un-



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reasonable searches and seizures.” Because the Fourth Amendment protects private citizens against governmental intrusions, most searches by private employers do not implicate constitutional concerns. See *Burdeau v. McDowell*, 256 U.S. 465 (1921). When an employer is acting in concert with the government, however, an unreasonable search may give rise to a claim under the Fourth Amendment. See *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975). Additionally, the constitutions and statutes of a few states protect employees from unreasonable searches by their employers. For example, the California State Constitution provides a right of privacy for private employees. Therefore, before conducting a search of an employee’s workspace, private employers should be aware of state privacy laws.

a. Search of Desks and File Cabinets. The U.S. Supreme Court has held that the search of a public employee’s desk and file cabinet is legal if it is reasonable under all of the circumstances. See *O’Connor v. Ortega*, 480 U.S. 709 (1987) (search in that case was unreasonable because the employee had a reasonable expectation of privacy in his desk and file cabinet as evidenced by the fact that he did not share them with other employees, had kept personal items in them for the last 17 years, and the employer had no policy prohibiting the use of the desk and file cabinet for personal reasons). Reasonableness is measured on a case-by-case basis and depends upon balancing the public, governmental, and private interests at stake in a given situation. *Id.* at 718. See also *Gossmeier v. McDonald*, 128 F.3d 481 (7th Cir. 1997) (search of employee’s desk and file cabinet was reasonable because both were used for work purposes).

An employer’s search may be considered unreasonable if the employer does not have a policy with regard to searching employees’ desks, lockers, etc., especially if the employer does not have a practice of conducting such searches.

b. Resident Searches. Resident searches may be reasonable if the employee consents to such a search; however, if the search goes beyond the consent given, it may be deemed to be unreasonable.

c. Computer Searches. In *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183 (S.D. Cal. 2008), the court held an employer did not violate a former employee’s privacy by searching his laptop upon his termination. Although the former employee had the option of purchasing the laptop upon termination, he had not done so at the time the employer searched it. Accordingly, the court found that the former employee had no reasonable expectation of privacy in the contents of his laptop because it belonged to his employer.

d. Employee’s Text Messages. In *City of Ontario v. Quon*, 560 U.S. 746 (2010), the U.S. Supreme Court held that a city employer did not violate its employees’ Fourth Amendment right to be free from unreasonable searches by reviewing the employees’ text messages sent on pagers provided by the City. See also *Sunbelt Rentals, Inc. v. Victor*, 43 F. Supp. 3d 1026, 1035 (N.D. Cal. 2014) (rejecting former employee’s invasion of privacy claim based on the former employer’s alleged accessing of his text messages on a company-owned cell phone, where the plaintiff was no longer an employee of the company that owned the cell phone and had no right to exclude others from accessing it since he did not own or possess it and no longer had any right to access). In *Sunbelt Rentals*, the court also found the plaintiff facilitated the transmission of text messages to the company-owned phone because he failed to unlink it from his personal Apple account. For a more detailed discussion of this decision, please see the *Data Privacy* Chapter of the SourceBook.

3. Recovery for Psychological Injuries. Many invasion of privacy claims are based upon psychological distress. The U.S. Supreme Court adopted a “zone of danger” test to be used in determining whether employees should recover damages for job-related psychological injuries. In *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the Court held that, while the Federal Employer’s Liability Act includes claims for negligent infliction of emotional distress, employees can recover for emotional injuries that are not accompanied by physical injuries only if the emotional



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injuries were foreseeable, the employer was responsible, and the claims appear to be genuine. The Court subsequently limited the holding of *CONRAIL* somewhat by holding “the ‘physical impact’ to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time—where that substance, or related circumstance, threatens no harm other than that disease-related risk.” See *Metro-N. Commuter R.R. v. Buckley*, 521 U.S. 424, 430 (1997).

4. Reducing Exposure to Invasion of Privacy Claims. An employer can reduce exposure by limiting disclosure of: investigative information, applicant history, medical testing or screening results, background check results, or other private or possibly private information to as few people as possible. Additionally:

- In accumulating information, be aware of state and federal statutes restricting the use of pre-employment inquiries, lie detector tests, or credit reports.
- Limit the information accumulated to that which can be justified as truly job-related. Impose a “need to know” standard.
- Obtain information in as narrow an inquiry as possible. Do not ask for any information beyond that which can be justified and documented for legitimate business reasons.
- If the information is obtained as part of the hiring and screening process, access should, if possible, be limited to those involved in that process. This is also true of the investigative process.
- If the information is requested by a prospective employer, the former employer may wish to request a release signed by the former employee.
- Consider using releases and consent forms before gathering information and when it is subsequently requested by and released to a prospective employer or other party.
- Inform employees in advance that they may be searched or questioned at management’s discretion and that they will be expected to cooperate.

F. Intentional Infliction of Emotional Distress. In extreme cases, an employer may be found to have committed the tort of intentional infliction of emotional distress.

1. Elements of Intentional Infliction of Emotional Distress.

a. Extreme and Outrageous Conduct by an Employer. To commit the tort of intentional infliction of emotional distress, the conduct must be so outrageous in character and extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized society. See, e.g., *Riske v. King Soopers*, 366 F.3d 1085 (10th Cir. 2004) (finding an issue of fact for jury to determine regarding whether, under Colorado law, a supervisor’s harassing conduct that lasted over two years and included sending notes and flowers to the plaintiff constituted extreme and outrageous conduct). It does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. Sexual harassment may constitute “outrageous conduct” and a supervisor who assists the harasser in covering up harassment may be liable for intentionally inflicting emotional distress, but a supervisor who does nothing probably will not. See *King v. Kidd*, 640 A.2d 656 (D.C. Cir. 1993). See also *Smith v. Iowa State Univ. of Sci. & Tech.*, 838 N.W.2d 869 (Iowa Ct. App. 2013) (affirming \$500,000 jury verdict for intentional infliction of emotional distress in favor of employee who was harassed by three superiors for years, falsely accused multiple times of being violent and a threat to others, resulting in a campus police investigation and threat assessment, subjected to false performance reviews, lied to about a promotion, isolated and ostracized, and subjected to plots to have him fired), *affirmed in part, vacated in part, Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 38 (Iowa 2014), *reh’g denied* (Aug. 14, 2014) (affirming jury verdict on intentional infliction of emotional distress claim but vacating jury verdict on whistleblower claim); *Kiefner v. Sullivan*, 2014 WL 2197812, at *14 (N.D. Okla. May 27,



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2014) (“Manipulating a subordinate employee’s termination, where such employee otherwise may be terminated only for cause during a protected term, potentially goes beyond a mere insult, indignity, or inconsiderate action in the workplace. Further, Plaintiff alleges that these defendants entered into certain negotiations with Plaintiff on the date of the death of his son, which contributed to the outrageousness of their conduct and the emotional distress he suffered. Although the facts will be carefully scrutinized at the summary judgment stage, the facts are sufficient to state a plausible claim for Intentional Infliction of Emotional Distress (IIED) at the Rule 12(b)(6) stage.”).

b. Intentionally or Recklessly Causes. The intent element means that the actor desires the consequences of the act or believes the consequences are substantially certain to result from the act. *McGanty v. Staudenraus*, 901 P.2d 841, 852 (Or. 1995).

c. Severe Emotional Distress. Because of this strict standard, cases alleging this tort are usually dismissed.

Some states preclude a cause of action for intentional infliction of emotional distress for emotional distress resulting from harm to reputation and good name caused by the publication of defamatory statements. See *Moss v. Camp Pemigewasset, Inc.*, 312 F.3d 503, 510 (1st Cir. 2002) (affirming dismissal of plaintiff’s intentional infliction of emotional distress claim; holding that such a claim could only encompass the emotional distress caused by the alleged defamer’s statement to the plaintiff, which was not so outrageous in character or extreme in degree as to go beyond all possible bounds of decency and could not be the basis of an intentional infliction of emotional distress claim).

In *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004), the Texas Supreme Court reversed a \$9.5 million award to a plaintiff who prevailed on her sexual harassment and intentional infliction of emotional distress claims, holding that, where the gravamen of the plaintiff’s complaint is sexual harassment, the plaintiff must proceed solely under the statute prohibiting sexual harassment unless there are additional facts unrelated to sexual harassment that support an independent tort claim for intentional infliction of emotional distress. See also *Roland v. Potter*, 366 F. Supp. 2d 1233 (S.D. Ga. 2005) (plaintiff’s intentional infliction of emotional distress claim was wholly derived from the alleged conduct that gave rise to her Title VII claim and, therefore, was pre-empted by Title VII), *aff’d*, 200 Fed. App’x 868 (11th Cir. Oct. 11, 2006).

2. Exclusive Remedy Provisions of Workers’ Compensation and Intentional Infliction Claims. Whether an intentional infliction of emotional distress claim is pre-empted by the exclusivity provisions of the state’s workers’ compensation scheme depends on the case law of the particular venue. See, e.g., *Livitsanos v. Superior Court*, 828 P.2d 1195 (Cal. 1992) (workers’ compensation is the exclusive remedy for employees who file claims of intentional infliction of emotional distress against their employers, even if there is no compensable physical injury or disability); *Yuille v. Bridgeport Hosp.*, 874 A.2d 844 (Conn. App. Ct. 2005) (workers’ compensation exclusivity provision barred intentional infliction of emotional distress claim based on employer’s administration of employee’s workers’ compensation claim). *But see Flait v. N. Am. Watch Corp.*, 3 Cal. App. 4th 467 (Cal. App 2d Dist. 1992) (discharged employee’s claims of emotional distress arising from violation of California Fair Employment and Housing Act are not barred by exclusive remedy provision of California Workers’ Compensation Act).

G. Negligent Infliction of Emotional Distress. Some states recognize a cause of action for negligent infliction of emotional distress. For example, in Connecticut, this claim is recognized, but only with regard to conduct that occurred during the actual termination, not during the employment relationship. See *Parsons v. United Techs. Corp.*, 700 A.2d 655 (Conn. 1997). See also *Antonopoulos v. Zitnay*, 360 F. Supp. 2d 420 (D. Conn. 2005) (no negligent infliction of emotional distress claim based on constructive discharge).



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H. Malicious Prosecution. Malicious prosecution is the use of a criminal or civil proceeding for an improper purpose. Elements of the tort of malicious prosecution are: (1) institution of a proceeding; (2) by or at the insistence of the defendant; (3) termination of such proceedings in the plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceedings; and (6) suffering of injury or damage as a result of the prosecution. *See, e.g., McClinton v. Delta Pride Catfish, Inc.*, 792 So. 2d 968, 973 (Miss. 2001) (affirming summary judgment in favor of employer where former employee could not establish lack of probable cause or malice); *Condere Corp. v. Moon*, 880 So. 2d 1038, 1040 (Miss. 2004) (reversing jury verdict in favor of plaintiff on malicious prosecution claim; noting that malice in the context of malicious prosecution "connotes a prosecution instituted primarily for a purpose other than that of bringing an offender to justice"; that the employer filed a defamation claim against the plaintiff did not show malice); *Hodges v. Gibson Products Co.*, 811 P.2d 151, 156 (Utah 1991) ("The elements of malicious prosecution are: (1) defendants initiated or procured the initiation of criminal proceedings against an innocent plaintiff; (2) defendants did not have probable cause to initiate the prosecution; (3) defendants initiated the proceedings primarily for a purpose other than that of bringing an offender to justice; and (4) the proceedings terminated in favor of the accused."). In *Hodges*, the court noted there is authority that the innocence of the plaintiff should be an affirmative defense rather than an element of the plaintiff's claim.

I. Abuse of Process. The elements of abuse of process are: (1) an illegal and improper perverted use of the process, which was neither warranted nor authorized by the process; (2) ulterior motive or purpose of a person in exercising such illegal, perverted, or improper use of process; and (3) resulting damage or injury. *See, e.g., McClinton v. Delta Pride Catfish, Inc.*, 792 So. 2d 968, 975 (Miss. 2001) (plaintiff's claim that employer desired to use his arrest for grand larceny to deter other employees from similar conduct did not constitute abuse of process). Evidence that the employer had a good faith belief in reporting the underlying crime (typically theft) is a valid defense. *See, e.g., Graham v. Best Buy Stores, L.P.*, 298 F. App'x 487, 497 (6th Cir. 2008) (dismissing abuse of process claim by employee who sued employer after he was arrested but not prosecuted for theft, where the employee offered no facts to show that the employer acted with ulterior motive in reporting its belief he committed theft).

Abuse of process differs from malicious prosecution in that it involves the misuse or misapplication of the judicial process instead of the commencement of a legal action. An action for malicious prosecution can properly be commenced only after a legal proceeding has terminated in favor of the plaintiff. However, an action for abuse of process can be initiated before the legal proceeding has concluded. *Restatement (Second) of Torts* § 682, Cmt a (1977).

J. False Imprisonment. False imprisonment is the intentional restraint by one person of the freedom of movement of another. Any period of restraint, no matter how brief, may be sufficient to support a claim for false imprisonment. Detention of an employee for lengthy interrogation may result in a claim. Typically, allegations of false imprisonment arise when an employer detains and questions employees suspected of theft or assault or when an employee's safety is compromised by possible drug or alcohol abuse. An employee may claim false imprisonment if she or he is blocked from leaving a room because a supervisor is standing between the employee and the only exit from the room. *See Restatement (Second) of Torts* §§ 653(a), 674(a) (1977).

The confinement must be intentional but does not have to be motivated by malice. Voluntary consent is a complete defense to a claim of false imprisonment.

K. Sexual Harassment. Most states do not recognize a common-law tort of sexual harassment. *See, e.g., Yeary v. Florida*, 1995 WL 788066 (M.D. Fla. May 13, 1995); *Ball v. Heilig-Meyers Furniture Co.*, 35 F. Supp. 2d 1371, 1375 (M.D. Fla. 1999) (examining federal and state decisions interpreting Florida law and finding no support for a common law claim of sexual harassment; granting employer's motion to dismiss).

Workers' Compensation Pre-emption of Sexual Harassment Claims. In some states, the state workers' compensation scheme may pre-empt claims for damages predicated upon sexual harass-



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ment. See, e.g., *Dickert v. Metropolitan Life Ins. Co.*, 428 S.E.2d 700 (S.C. 1993), as modified on grant of rehearing, (plaintiff's tort claims that arose out of sexually harassing conduct by a co-worker were pre-empted by the exclusive remedy provision of the South Carolina Workers' Compensation Act; however, claims against the co-worker individually were not pre-empted); *Juarez v. Ameritech Mobile Commc'ns, Inc.*, 957 F.2d 317 (7th Cir. 1992) (claims for emotional distress arising from sexual harassment are pre-empted by Illinois Workers' Compensation Act).

For information regarding sexual harassment claims brought pursuant to Title VII, see the *Harassment* Chapter of the SourceBook.

L. Workers' Compensation Retaliation. A workers' compensation retaliation claim typically is filed by an employee who claims under state law that the employer discharged, threatened to discharge, intimidated, or coerced the employee by reason of the employee's valid claim for compensation or attempt to claim compensation. An employer's denial or disruption of benefits can also create the basis of a retaliation claim. The action may vary from state to state depending upon the individual states' workers' compensation schemes.

M. Tortious Interference With an Advantageous Business Relationship.

1. Elements of Tortious Interference. The tort of intentional or tortious interference with advantageous relations is designed to protect a plaintiff's present and future economic interests from wrongful interference. The elements of the tort of intentional interference with an advantageous business relationship are as follows: (a) the existence of a business relationship, not necessarily evidenced by an enforceable contract; (b) knowledge of the relationship on the part of the defendant; (c) an intentional and unjustified interference with that relationship by the defendant; (d) proof the interference caused the harm sustained; and (e) damage to the plaintiff as a result of the breach of the relationship. See, e.g., *Setliff v. Stewart*, 694 N.W.2d 859 (S.D. 2005). This is a state law cause of action, and the elements may vary depending on the specific state's laws. This cause of action is distinct from tortious interference with business contract. See, e.g., *Bentlejewski v. Werner Enterprises, Inc.*, 2015 WL 4111476, at *6 (W.D. Pa. July 8, 2015) ("Pennsylvania recognizes both interference with existing contractual relations and interference with prospective contractual relations as branches of the tort of interference with contract."). In *Bentlejewski* the court found the employment verifications given to prospective employers did not constitute intentional interference with a contractual relationship because they were privileged and there was no evidence they were provided improperly.

There is a higher burden to establish interference with a prospective, rather than, an existing contract. See, e.g., *GE Capital Corp. v. Commercial Servs. Group, Inc.*, 485 F. Supp. 2d 1015, 1027 (N.D. Iowa 2007); *Progressive Cas. Ins. Co. v. All Care, Inc.*, 914 So. 2d 214, 218-19 (Miss. Ct. App. 2005).

2. Interference by a Corporation. Because courts require "interference" be an act by a third person, courts have found that a corporation is not capable of interfering with its own contract and treat the claim as one for breach of contract. *Hickman v. Winston County Hosp. Bd.*, 508 So. 2d 237 (Ala. 1987). Moreover, a supervisor, as a part of the corporation whose job it is to hire, evaluate, and terminate employees, is also not liable. See *Delloma v. Consolidation Coal Co.*, 996 F.2d 168 (7th Cir. 1993) (employer's truthful responses to a prospective employer's questions about a discharged employee were privileged against claim of tortious interference with contract). However, when an employee can prove bad faith, she or he may prevail in an action for tortious interference. See *Chandler v. Bombardier Capital*, 44 F.3d 80 (2d Cir. 1994) (employee successfully asserted an interference claim against his former employer's vice president for falsely telling the company president the employee admitted failing to immediately report a delinquent account in an effort to hide a problem where there was evidence the vice president was acting in his own interest, not the employer's, since he took over the former employee's department upon his discharge). In *Blackstone v. Cashman*, 860 N.E.2d 7 (Mass. 2007), the court held that a corporate official who was charged with tortious interference with a prospec-



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tive economic relationship (the plaintiff's continued employment with the company for which he and the official worked) was entitled to a jury instruction that the plaintiff had to show the official acted with "actual malice" unrelated to his corporate duties when he allegedly interfered with the plaintiff's future with the company.

3. "Negligent Interference with Employment Relationship." Negligent interference with an employment relationship is not actionable in most states. See, e.g., *Fla. Power & Light Co. v. Fleitas*, 488 So. 2d 148 (Fla. 3d DCA 1986).

N. "Wrongful Discharge" Claims in Unionized Setting.

1. The National Labor Relations Act (NLRA). The NLRA pre-empts any state tort claim that requires interpretation of a labor agreement.

In 1988, the U.S. Supreme Court ruled that a tort action for retaliatory discharge for filing a workers' compensation claim was not barred by "just cause" language or the grievance and arbitration provisions of a union contract, even if the reviewing court must interpret the collective bargaining agreement (CBA). *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988).

2. The Railway Labor Act (RLA). In *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), the U.S. Supreme Court held that the state law claims of wrongful discharge of an airline mechanic covered by a CBA, who refused to sign off on a maintenance record of a plane he considered to be unsafe, were not pre-empted by the RLA. The employee, who was fired for insubordination, was allowed to bring his claim because it was not dependent on interpretation of the CBA. For a more detailed discussion of this issue, please see the *RLA's Interaction with Other Laws* Chapter of the SourceBook.

O. "Whistleblower" Protection: Discharge of Employee in Violation of "Public Policy." Many states have laws that protect "whistleblowers," covering either public sector or private sector employees or both. Additionally, some states protect employees who are discharged for refusing to violate the law, even if they are not "whistleblowers." Check the case law of the state in question. See, e.g., *Gadlage v. Winters & Yonker*, 547 F. App'x 666 (6th Cir. Oct. 24, 2013) (affirming dismissal of plaintiff's claim that his discharge violated public policy, noting this exception is established in Kentucky "only when the discharge is shown to be 'contrary to a fundamental and well-defined public policy as evidenced by existing law,' and when the policy is 'evidenced by a constitutional or statutory provision'"; plaintiff's claim he was discharged for refusing to engage in conduct that violated the Kentucky Supreme Court Rules governing the practice of law was too vague to state a claim of wrongful discharge in violation of public policy because he did not identify a specific Supreme Court Rule he refused to violate): *Davis v. Cmty. Alternatives of Wash., D.C.*, 74 A.3d 707 (D.C. 2013) (to state a claim of wrongful discharge in violation of public policy, which creates a narrow exception of the employment at will doctrine, "an employee must first identify either a public policy this court has previously recognized or 'make a clear showing, based on some identifiable policy that has been 'officially declared' in a statute or municipal regulation, or in the Constitution, that a new exception [to the at-will doctrine] is needed ... The employee must then show 'a close fit between [that] policy ... and the conduct at issue in the allegedly wrongful termination'"); *Rose v. Anderson Hay & Grain Co.*, 2015 WL 5455681, at *9 (Wash. Sept. 17, 2015) (plaintiff who was allegedly terminated for refusing to falsify his drive log and drive in excess of federally mandated limit met his burden of establishing his termination for refusing to break the law contravened a legislatively recognized public policy; plaintiff's claim was not pre-empted by the Surface Transportation Assistance Act because it contains an express nonpre-emption provision. Accordingly, the plaintiff's wrongful discharge in violation of public policy claim survived summary judgment.). Additionally, many federal laws, such as Occupational Safety and Health Administration (OSHA), Title VII, the Fair Labor Standards Act (FLSA), the NLRA, and the Energy Policy Act have retaliation provisions that protect employees from adverse actions for "whistleblowing" under those laws. See the *Discipline and Discharge* Chapter of the SourceBook for a detailed discussion of federal whistleblower claims.



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P. Requirement of Fair Dealing With Employees. In some states, discharges have been deemed improper when they were accomplished to avoid an obligation owed to the employee by the employer, or when other extreme and outrageous conduct of the employer has been deemed intolerable. For example, an employee could sue for a violation of a duty of fair dealing if discharged to avoid payment of commissions, *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977), or to avoid payment of pension benefits, *United Steelworkers of Am. v. Gen. Fireproofing Co.*, 464 F.2d 726 (6th Cir. 1972), or for refusal to provide sexual favors to a supervisor, *Byrd v. Richardson-Greenshields Secur., Inc.*, 552 So. 2d 1099 (Fla. 1989). *But see Hutson, Inc. v. Windsor*, 2015 WL 4133670, at *4 (W.D. Ky. July 8, 2015) (rejecting plaintiff's claim because "Kentucky law 'does not recognize a claim of breach of the covenant of good faith and fair dealing in the employment context.'") (citations omitted).

Similarly, an employer may be permitted to sue an employee for breach of the duty of loyalty in some states. *See, e.g., Setliff*, 694 N.W.2d 859 (noting that in South Dakota, all employees have a statutory duty of loyalty; this statute requires the employee to prefer his employer's business interests to his own).

Q. Civil Conspiracy. To establish a civil conspiracy claim, the plaintiff must generally prove: (1) two or more people; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action to be taken; (4) the commission of one or more unlawful acts; and (5) damages as the proximate result of the conspiracy. *See, e.g., Setliff*, 694 N.W.2d 859. The court in *Setliff* noted, "this is not an independent cause of action but is 'sustainable only after an underlying tort claim has been established.'" *Id.* at 867 (citations omitted). A civil conspiracy is, fundamentally, an agreement to commit a tort. *Id.* This is a state cause of action and the specific elements to be established may vary according to the state's law.

R. Civil Racketeer Influenced and Corrupt Organizations Act (RICO) Claims Based on Violation of Immigration Laws. Some courts have recognized claims by plaintiffs alleging an illegal criminal enterprise composed of employers, recruiters and staffing companies engaged in a scheme to bring illegal workers to the U.S. in order to suppress the wages of legal workers. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) (legally documented workers alleging that employers leveraged hiring of undocumented workers in order to depress wages). *But see Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004) (rejecting RICO claim complaint alleging that a meat-processing company conspired with recruiters and a Chinese aid group to employ undocumented workers in an effort to drive down employee wages; the court found no common purpose among the entities in the enterprise).

III. POTENTIAL CLAIMS ARISING OUTSIDE OF THE IMMEDIATE EMPLOYMENT RELATIONSHIP

A. Vicarious Liability. Vicarious liability means one person is indirectly responsible, or liable, for the negligent acts of another. The person injured by such negligence, therefore, may seek damages from the person indirectly liable. *Black's Law Dictionary*, 1404 (5th ed. 1983).

1. Applications and Limitations of Vicarious Liability. To hold one person liable for the negligence of another, there must be a relationship in which one person acts through another to accomplish his or her own ends. In addition, this relationship must have existed at the time of the negligent act, and the act must have been committed in the scope and course of the relationship, such as a master/servant or employer/employee. Statutes may prevent the application of vicarious liability in certain situations.

2. Basis of Liability Related to Vicarious Liability.

a. Respondeat Superior. It is a rule of law that an employer is responsible for the injuries inflicted by its employees acting within the "scope of employment," based on the theory that the



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employer has the authority to supervise and control its employees. In addition, the employer possesses the ultimate right to discharge disobedient employees and to hire more competent employees.

b. “Scope of Employment.” “Scope of employment” means the employee was doing what the employer directed the employee to do, or what the employee could be expected to do from the nature of the employment, or that the employee acted in furtherance of the employer’s business.

The employee’s conduct is within the scope of the employment only if: it is the kind the employee is employed to perform; it occurs substantially within the employer authorized time and space limits; and it is initiated at least in part for the purpose of serving the employer’s interests.

The conduct, however, may be within the “scope of employment” even if it is not authorized by the employer, if it is of the same general nature as the authorized conduct, or is incidental to the authorized conduct. *See, e.g., Sussman v. Fla. E. Coast Props., Inc.*, 557 So. 2d 74 (Fla. 3d DCA 1990) (employee acted outside the scope of her employment when she stopped at a supermarket on her way to work to purchase a cake for a fellow employee’s birthday celebration, thus employer was not liable for injuries caused when the employee struck and injured a pedestrian).

Whether the employer knew of the act that caused the injury is unimportant. Instead, the purpose of the act, including the method of performance, is the key consideration in determining an employer’s liability.

The liability of an employer for the conduct of its employee may even be invoked when a third person is injured by a criminal act committed by the employee that was incident to, or committed within, the “scope of employment.” *See Rivas v. Nationwide Pers. Sec. Corp.*, 559 So. 2d 668 (Fla. 3d DCA 1990) (security company liable for assault of security guard on cashier because guard was acting within the scope of his employment).

B. Failure to Control. An employer may be held liable for its failure to control its employees even if the employees were acting outside the scope of their employment. To prevail, the injured third party must show: the employee was engaged in conduct that is dangerous to the general public; the employer knew about the employee’s dangerous behavior or his propensity for dangerous behavior; and the employer had the ability to control the employee and reduce the probability of harm to others.

In addition, the injury must have occurred because of an act by the employee that could reasonably have been anticipated by the employer, and the employer, through the exercise of due diligence and authority over the employee, might reasonably have prevented.

C. Employer’s Liability to Employees’ Unborn Children. The U.S. Supreme Court has ruled that employers may not bar women from jobs that could be hazardous to their unborn children. *See Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). This ruling puts employers in a no-win situation: management is not able to preclude women of child-bearing age from working in environments that may affect their unborn children, yet the employer may become liable under negligence or fraudulent concealment theories if a female employee’s unborn child is harmed by exposure in the work environment. It is not clear whether employers will be protected from actions by children who may have suffered harm while in the uterus as a result of those hazards.

Management should clearly inform employees about the hazards of a particular job, take whatever steps are reasonable to assure safety standards are met, and consider obtaining “a knowing waiver” from employees of both sexes willing to take hazardous jobs. For discussion on this issue, see the *Sex Discrimination* Chapter of the SourceBook.



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D. Negligent Employment. In a negligent employment case, a third party sues an employer for injuries caused by its employee. Unlike claims based on vicarious liability, which seek to make the employer indirectly liable for an employee's negligence, negligent employment theories are based on the negligence of the employer. Liability turns on an act by the employer that made injury to the third party reasonably foreseeable. An employer may be liable, even for acts of an employee (and sometimes an ex-employee) outside the scope of employment, if the employer knew or should have known the employee posed an unreasonable risk of harm. Branch, *Negligent Hiring Practice Manual*, § 1 (1988).

1. Elements of a Negligent Employment Claim. Just as in all negligence suits, the injured party must prove certain elements in order to establish a valid claim. The basic elements are: duty, breach, cause in fact, proximate cause, and damages.

a. Duty. A duty was owed by the employer if: (1) an employment relationship existed between the defendant employer and the person who caused the injuries; and (2) a sufficient connection existed between the plaintiff and the employer's business activities to impose a duty of care.

b. Breach. The duty owed by the employer is breached when: (1) the employee was incompetent and the employer had actual knowledge the employee was incompetent; or (2) the employer failed to adequately investigate the employee's background, provide adequate training, or adequately evaluate the employee's job performance, when an incompetent employee created a well-known risk of harm.

c. Cause in Fact. The employer's negligence is a cause in fact of the plaintiff's injury when the injury was caused by the same characteristic that rendered the employee incompetent.

d. Proximate Cause. The employer's negligence is the proximate (that is, legal) cause of the plaintiff's injuries if: (1) the injury was reasonably foreseeable considering the information that an adequate personnel policy would have uncovered; or (2) the failure to investigate itself created a specific type of risk and the plaintiff's injury falls within this risk; or (3) the plaintiff's injury was the direct outcome of the employer's negligence.

e. Damage. Plaintiff was damaged by the employer's negligence.

2. Application. The direct negligence of the employer may be based on its decision to hire, retain, assign, or promote an employee to a position for which she or he was unfit or on the employer's inadequate training or supervision. See, e.g. *Najera v. Recana Solutions, LLC*, 2015 WL 4985085, at *3 (Tex. App. Aug. 20, 2015) (noting negligent hiring, retention, and supervision claims are all simple negligence causes of action based on an employer's direct negligence rather than on vicarious liability.) In *Najera*, the court held "foreseeability of the risk is the foremost and dominant consideration" in determining liability for negligent hiring. "Foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others." *Id.* (citations omitted). The court rejected the plaintiff's negligent hiring claim based on an attack by another worker because that worker's job as a laborer on the plant's fumigation team "did not involve circumstances of heightened confrontation or particularly dangerous tools or weapons. Therefore, this is not a situation that foreseeably created a peculiar risk of harm to others by reason of the employment duties." *Id.* Additionally, the court found no evidence the worker assaulted the plaintiff as a result of incompetence or unfitness for the job, nor was there evidence that the worker was incompetent in his job duties such that the employer was negligent for retaining him. The court also noted that the circumstances in this case did not reflect any special circumstances that would enlarge the employer's duty to investigate the attacker's criminal background, holding, "performing criminal background checks on every unskilled laborer [the defendant] places would likely impose a significant administrative burden and costs."

3. When Negligent Employment Theory Applies. Negligent employment claims are brought when the injury occurs outside the usual workplace and when: (a) the nature of the job makes



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an injury arising from contact between an incompetent or dangerous employee and a third party foreseeable; (b) the nature of the job either makes active supervision impracticable or necessarily places control in the hands of the employee, which typically allows the employee to engage in contact with the public without active supervision; or (c) the nature of the job necessarily places the safety of third parties in the hands of the employee. These claims are often associated with federal claims for sexual harassment or retaliation.

Some lawsuits seek damages for injuries that occurred after normal working hours, away from the job site, or under circumstances clearly removed from work-related tasks, duties, and responsibilities.

The success of most negligent employment claims depends on whether the employer knew or should have known of the employee's propensity to commit whatever action or inaction gave rise to the suit. *See, e.g., McCafferty v. Preiss Enters.*, 534 F. App'x 726 (10th Cir. Aug. 13, 2013) (affirming summary judgment on plaintiff's claim the employer negligently hired an employee who engaged in sexual misconduct with the under-aged plaintiff, holding, "[t]he record does not contain any indication that [the employee] was an 'improper person[]' who posed a 'risk of harm to others' at the time he was hired." Additionally, the court rejected plaintiff's negligent supervision claim because the employee was not acting within the scope of his employment when the sexual misconduct occurred, nor did it occur on the employer's property or involve the use of the employer's chattel.)

4. Policies to Minimize Exposure to Liability for Negligent Employment Claims.

- a.** Develop an effective employment application form based on negligent employment concerns. Require the applicant to list every employer for the past seven or 10 years and explain any periods of unemployment. Require the applicant to list each supervisor at each prior employer. Review the applicant's employment application, specifically looking for gaps in the applicant's employment record and other unusual entries or omissions. For a further discussion of employment applications and the potential impact of the Fair Credit Reporting Act (FCRA) on applicant background checks, see the *Hiring* Chapter of the SourceBook.
- b.** Obtain the applicant's authorization to gather information from all former employers, educational institutions, and personal references. This authorization should be included on the job application form and perhaps on separate, individual forms for each prior employer. Indemnification of prior employers and the prospective employer for liability arising out of such inquiries should also be included in the authorization.
- c.** Contact each prior employer and each supervisor listed on the application. If the information provided by the applicant is insufficient, obtain further information, such as forwarding addresses. If a former employer is reluctant to give a reference, at least document that you have contacted the reference and attempted to get the necessary background information regarding the applicant.
- d.** Contact each personal reference listed on the application. Document all information received from personal references.
- e.** Ask all former employers and personal references whether there is any reason for them to doubt the applicant's competency, honesty, trustworthiness, or reliability. Also, ask whether they are aware of anything in the applicant's background that would affect their suitability for your employment, including whether the applicant has engaged in any violent, criminal, or improper conduct in the past.
- f.** Check the driver's license and the driving record of any applicant who, if hired, will be required to drive in the course of their employment. Some states restrict inquiries into driving history. Check the applicable state laws. Note that such a search may be covered by the FCRA if it is conducted by an outside agency; however, searches of driver's records con-



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ducted by the employer itself are not covered by the FCRA. See the *Hiring* Chapter of the SourceBook for a further discussion of the FCRA.

g. Determine whether it is necessary to conduct a criminal record search, based on the job that is to be filled, the information provided by the applicant on the application form, information learned from previous employers or personal references, and information learned through the initial interview. Employers should keep in mind that the Equal Employment Opportunity Commission (EEOC or Commission) takes the position that “[t]he fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.” *EEOC Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VB2. Additionally, the EEOC Guidance states, “[n]ational data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.” Thus, the agency has stated that a policy of excluding everyone with a criminal record “from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law.” See *Questions and Answers About the EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*, http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm. Additionally, President Obama has directed the Office of Personnel Management (OPM) to modify federal hiring rules to delay inquiries into an applicant’s criminal history until later in the hiring process. See *Obama Directs OPM to Curb Criminal-History Inquiries*, 211 Daily Lab. Rep. [BNA] A-6, Nov. 2, 2015. The President he was “taking the action to ensure that federal job applicants with criminal histories aren’t locked out from consideration at an early stage in the process.” *Id.* Additionally, he urged Congress to approve legislation that would “ban the box” for federal hiring and hiring by federal contractors. *Id.* (Ban the box refers to the box applicants often are required to check to indicate whether they have been arrested/convicted of a crime.) Some state laws also prohibit employers from inquiring into an applicant’s criminal history at the application stage or place other restrictions on the type of criminal history employers can obtain. Employers should ensure their applications and hiring procedures comply with applicable state laws. For more information on this issue, please see the *Hiring* Chapter of the SourceBook.

h. Conduct reference checks on employees referred by employment agencies. Do not rely solely on employment agencies to check references.

i. Conduct reference checks even on temporary employees who will have employer-sponsored access to the public.

j. Do not offer any applicant employment until the pre-employment screening process has been completed.

k. Consider informing applicants that employment is contingent upon a satisfactory reference check.

5. The Employer’s Duty. An employer has a duty to make an adequate investigation of an applicant’s fitness before hiring. The extent of the duty may vary with the circumstances as discussed below. When an employer breaches this duty, the employer may be held liable for negligent hiring. The duty is breached when the employer hires an employee it knew, or in the exercise of reasonable care should have known, was incompetent or unfit for the work assigned. “Incompetence” means that the employee possessed certain personal or physical characteristics that created an unreasonable risk to third parties.



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The notion of risk creation implies the injury-producing conduct of the employee was predictable. In order to recover, the injured party may have to show a pattern of such conduct to establish the past behavior had practical predictive value and justifies the conclusion the particular employee was “incompetent.” In some cases, plaintiffs have been awarded punitive damages if they are able to prove the employer had knowledge of the prior behavior in question.

6. What Constitutes Adequate Investigation of a Prospective Employee. A judge or jury must decide, after the fact, what would have constituted an “adequate investigation” given the particular situation. The scope of the duty to investigate is relative to the magnitude and likelihood of risk associated with a particular job. Jobs that pose the greatest risk to the public, like law enforcement, require the most extensive background checks. In some situations, an employer may face a no-win situation. If an initial investigation raises serious questions about a particular applicant’s fitness, the employer may be found liable if it fails to take additional investigative steps. Alternatively, if the employer made absolutely no effort to investigate the applicant, courts have considered this to be a total lack of care. In these situations, the court will usually not play the “what if” game to determine whether an investigation, if conducted, would have revealed sufficient information to have prevented the hiring. A well-documented and adequate investigation of an applicant, together with policies that eliminate incompetent applicants, can help employers avoid liability in negligent hiring cases.

7. The Job Application. The job application is usually the first step an employer uses to gain information about an employee. In an effort to conduct an adequate investigation, an employer should use a form designed to obtain complete, accurate, and useful information. See the *Hiring* Chapter of the SourceBook for more information. State laws vary with regard to information that can be obtained from applicants. Check applicable state laws when developing an application form.

a. Authorization. The application should include authorization to obtain information from all former employers, educational institutions, and other people mentioned on the form. Indemnification of prior employers and the prospective employer for liability arising out of such inquiries should also be included in the authorization.

b. Dishonesty May Result in Discharge. It is useful to prominently note on the form that failure to disclose and dishonesty on the application may result in immediate discharge, whenever it may be discovered. This may encourage the applicant to take care in completing the form as well as reduce incentive to misrepresent qualifications and background.

c. Unrequested Information. An applicant is under no obligation to furnish information that is not specifically requested by the employer – for this reason the form should be carefully drafted to avoid omissions by the employee. See *Genier v. Dep’t of Empl. Sec.*, 438 A.2d 1116 (Vt. 1981) (holding employer liable for unemployment benefit contribution for employee who failed to note previous discharge; the application did not require the listing of all previous jobs and reasons for termination, thus, applicant was under no obligation to reveal previous discharge).

8. Credit History. The federal FCRA, 15 U.S.C. § 1681, *et seq.*, regulates the businesses that supply credit reports. The FCRA specifically permits the furnishing of credit reports to prospective employers but requires certain notice be provided to the applicant. For an in-depth discussion of the FCRA, please see the *Hiring* Chapter of the SourceBook. The EEOC has held a public meeting to discuss the use of credit history in employee selection, but has not published guidance on this issue yet. See *EEOC Public Meeting Explores the Use of Credit Histories as Employee Selection Criteria*, <http://www.eeoc.gov/eeoc/newsroom/release/10-20-10b.cfm>. However, the EEOC, along with the Federal Trade Commission, provides some guidance on conducting background checks of applicants in *Background Checks What Employers Need to Know*, http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm. Some states have



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enacted laws prohibiting the use of credit checks for employment purposes. See the *Hiring* Chapter of the SourceBook for more information.

9. Drug Testing. The doctrine of negligent hiring has been used to hold employers liable when their employees, because of intoxication or drug use, injured or assaulted others. Employers have, therefore, initiated drug and alcohol testing programs. Some employees have claimed that the tests violate their rights to privacy and that employers do not have a right to regulate what they do off the job. Additionally, in states permitting the use of medical or recreational marijuana, drug testing may be more complicated. Please see the *Personnel and Supervisory Policies* Chapter of the SourceBook for a more detailed discussion of drug testing in the workplace.

E. Negligent Retention. Negligent retention is the breach of an employer's duty to be aware that an employee is unfit for the job and to take corrective action through retraining, reassignment, or discharge. Negligent hiring is a breach of the employer's duty to investigate an employee's fitness before hiring him or her. The principal difference between negligent hiring and negligent retention is the time at which the employer is charged with knowledge of the employee's unfitness. Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness. The issue of liability primarily focuses on the adequacy of the employer's pre-employment investigation of the applicant's background. Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate unfitness, and the employer fails to take further action, such as an investigation, discharge, or reassignment. See *Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. 2d DCA 1986).

Employers are being sued because they failed to fire or reassign employees who later cause injuries or commit crimes. Because negligent hiring is similar to negligent retention, often the complaint will allege both claims. Issues and considerations discussed in regard to negligent hiring may also be applicable to negligent retention. Based on the specific facts, however, the court may make a distinction between negligence in hiring and negligence in retention.

F. Policies to Minimize Exposure to Liability with Respect to Current Employees.

1. Whenever discharge is being considered and the employer considers giving the employee "one more chance," be certain to evaluate the situation the way a jury might in a negligent retention case.
2. In any situation involving an individual with access to the public and potentially dangerous equipment, an injured party may criticize the employer's security procedures, hiring procedures, and background screening. At trial, the employer may be accused of not recognizing potential "danger signs" even though those signs may not be noticeable to the average person. Because the risk to the public is greater in these situations, such employers are held to a higher degree of care to investigate and review employees to prevent foreseeable or reasonably foreseeable injuries.
3. Employers should understand if they are aware of complaints of sexual harassment against an employee but do not take any corrective measures, they may be subject to suit by the person harassed, not only for sexual harassment under Title VII but also state tort theories including negligent retention.
4. Because performance evaluations are an indication of an employee's continuing fitness/competence for the job held, employers should realize that in continuing to employ an employee whose performance evaluations suggest the employee is unfit or incompetent, they are setting themselves up for a negligent retention claim.
5. Employers should remember to re-evaluate and perhaps recheck references to ascertain an employee's fitness/competence for the new job if the employee is transferred to another job, particularly one with greater contact with fellow employees, customers, and the public.



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G. Employee Duty of Loyalty. In some circumstances, an employee can be considered to have a duty of loyalty to an employer. The position and therefore access to information held by the employee may support such a duty. See *Restatement (Third) of Agency* § 1001 (2006). Whether a duty of loyalty is owed is typically a question of fact.

IV. EMPLOYMENT LITIGATION DEFENSES

A. After-Acquired Evidence of Employee Wrongdoing. In *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352 (1995), the U.S. Supreme Court held that evidence of employee misconduct, which is discovered after a discharge, does not act as a complete bar to recovery under the Age Discrimination in Employment Act (ADEA). The after-acquired evidence must, however, be taken into consideration when fashioning an appropriate remedy for discriminatory discharge. The Supreme Court found that, as a general rule, in cases in which the employer discovers an employee engaged in misconduct of such severity the employee would have been discharged, the employee may only recover back pay from the date of the unlawful discharge to the date the employer discovered the misconduct, and is not entitled to reinstatement. *McKennon*, 511 U.S. at 1106.

B. Workers' Compensation Exclusivity Defense to Negligent Employment Claims. In some states, workers' compensation provides the exclusive remedy for covered employees who were injured on the job, while other states have created exceptions to this rule. See *Byrd*, 552 So. 2d 1099 (addressing state tort claims arising from sexually-oriented touching and remarks, the court held the clear public policy emanating from the federal and Florida law requires an employer be charged with maintaining a workplace free from sexual harassment and applying the exclusivity rule of workers' compensation to preclude any and all tort liability would abrogate this policy, and federal and state laws). In states where the workers' compensation program provides the exclusive remedy for workplace injuries, the injuries do not need to be all that significant for the exclusive remedy provision to apply. See, e.g., *Ezzy v. Workers' Comp. Appeals Bd.*, 146 Cal. App. 3d 252 (Cal. App. 1st Dist. 1983) (part-time law clerk who injured her finger in a coed softball game awarded benefits under California's Labor Code because the injury "occurred in the course of her employment."). Nevertheless, there are generally three main exceptions to the exclusive remedy provision (depending on the state): (1) the assault exception, (2) the intentional injury exception, and (3) the co-employee exception. Generally, for these exceptions to apply, there must be: (1) an assailant with some personal animosity toward the victim; (2) someone's actual intent to injure someone else; or (3) a co-employee's gross negligence. Some states, such as Arizona, have rejected the gross-negligence exception. See *Gamez v. Brush Wellman, Inc.*, 34 P.3d 375, 380 (Ariz. Ct. App. 2001) (stating to avoid exclusive nature of workers' compensation system, there must be a "genuine intentional injury, comparable to an intentional left jab to the chin").